UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EUGENE KAKAULIN,

Plaintiff,

v. 16 CV 8476 (GHW)

BLINK HEALTH, LTD., GEOFFREY CHAIKEN, MATTHEW CHAIKEN,

Defendants. PREMOTION CONFERENCE

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New York, N.Y.
December 8, 2016
4:02 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

SACK & SACK
Attorneys for Plaintiff
BY: JONATHAN S. SACK
ERIC R. STERN

PAUL WEISS
Attorneys for Defendants
BY: GREGORY F. LAUFER
CLAUDIA L. HAMMERMAN

(Case called)

THE COURT: I scheduled this conference as an initial conference regarding a potential motion to dismiss in response to the letters submitted by counsel for defendants yesterday.

I typically call for premotion conferences in short order, and I followed that practice here. In addition, however, I saw the second letter submitted by counsel for defendants and I thought that we might have the opportunity to address whatever issues defendants wanted to raise here during this conference as well.

MR. SACK: We haven't received any second letter.

THE COURT: There are two letters that were submitted on December 7th; first at Docket No. 10 as the premotion conference request letter, and the second December 7 letter, which is docketed on the public docket at Docket No. 11 as the letter to which I'm referring.

Would it be helpful if I handed that forward? It was docketed publicly.

MR. SACK: Was that docketed last evening? Perhaps counsel --

MR. LAUFER: Your Honor, if I may.

THE COURT: Please.

MR. LAUFER: They were docketed, I don't know the exact time, but I think sometime shortly after 5 o'clock. They were both docketed within minutes of each other.

I believe that our letter asking for a premotion conference on our anticipated motion to dismiss is docketed at Entry 10, and the letter to which your Honor was referring a moment ago was docketed at Entry 11.

THE COURT: Correct.

Counsel, I have a copy of the second letter to which I refer, the one that was docketed at Docket No. 10. If it would be helpful, we'd be happy to hand a copy forward.

MR. SACK: Thank you.

THE COURT: Thank you.

A copy of the letter that was docketed at Docket No. 11 has been handed forward to counsel for plaintiff.

So let's start with the premotion conference.

I reviewed the letter requesting a premotion conference with respect to a potential motion to dismiss the claims. I'd like to hear from counsel for defendants regarding the bases for the proposed motion.

Obviously this is not oral argument; the principal purpose of this is to schedule briefing on the motion to dismiss. Still, I'd like to give you the opportunity to describe the bases for the motion, Mr. Laufer. And then to the extent that plaintiff would like to make any comments in response, I'll give them the opportunity to do so, though you should not feel the obligation to do so if you do not wish.

Please proceed.

MR. LAUFER: Thank you, your Honor.

Again, my name is Greg Laufer from Paul Weiss. I represent the defendants Blink Health, Limited, Geoffrey Chaiken and Matthew Chaiken.

First of all, your Honor, I know that your individual rules of practice ordinarily require the attendance at conferences such as these by the lead trial counsel. In this case, the lead counsel, Andrew Ehrlich, unfortunately lost his father earlier this week and is unable to join us here today, but will, of course, be in attendance at future conferences before your Honor.

THE COURT: Thank you.

MR. LAUFER: I also want to thank your Honor for having us in so promptly and for giving us the opportunity to explain the bases for our anticipated motion.

As your Honor probably saw in the complaint, in the letter, there are five afforded causes of action that are asserted in the complaint. The first is a Dodd-Frank whistleblower claim; the second is a breach of express contract claim; the third is a claim for breach of the implied covenant of good faith and fair dealing; the fourth is a claim of breach of fiduciary duty, and the fifth is styled as a claim for specific performance.

Our anticipated motion currently would be directed only to the Dodd-Frank claim and the noncontract common law

claims; that is, the implied covenant claim, the fiduciary duty claim, and the specific performance claim.

Now, with respect to the Dodd-Frank claim, there are two principal bases for the anticipated motion.

First, as alleged in the complaint, Blink is a closely-held company; it's not public, it's not registered with the SEC, it doesn't have any securities registered with the SEC, it doesn't have any reporting obligations to the SEC. The only supposed violation of Dodd-Frank here is based on the Sarbanes-Oxley disclosure requirement. Significantly, as all the cases have unanimously held, Sarbanes-Oxley applies only to public companies and therefore there can be no Dodd-Frank whistleblower anti-retaliation claim that is predicated on Sarbanes-Oxley. So that's the first basis.

The second basis is that in order to state a Dodd-Frank whistleblower claim, the plaintiff has to plausibly allege both a subjective belief that he was reporting securities fraud or other violations of federal law, and that his belief was objectively reasonable.

The allegations in this complaint are quite threadbare with respect to the supposed subjective belief, but our anticipated motion would be directed principally at the objectively reasonable component of the plaintiff's supposed belief. And if you look at the complaint, there is a laundry list of ten what are called examples in the complaint of

supposed securities fraud. If you dig in a little bit deeper, you'll see that the term "securities fraud" and "securities violation" is sprinkled from page 1 all the way to the very end.

But if you actually look at the ten examples, not one of them can plausibly be described by a reasonably objective person as a securities fraud violation. You have misdealing or alleged misdealing with counterparties and business partners; you have supposed violations of HIPAA privacy laws; you have a, quote, aggressive upward revision of the company's budget; you have the fact that the company apparently or supposedly incorporated in Bermuda in an effort to minimize its tax liability, which is, of course, not uncommon or surprising; the use of allegedly, quote, aggressive revenue recognition technique, and the list goes on and on.

None of these things have anything to do with any of the enumerated grounds identified in Sarbanes-Oxley: Bank fraud, mail fraud, wire fraud, securities fraud, fraud on investors. They don't even allege any of that. No objective, reasonable person standing in this plaintiff's shoes who, as alleged in the complaint, has a Harvard MBA, is the founder of a company, and worked as an analyst in an investment bank, not to mention was the CFO of the company that he's now suing, could possibly believe that any of this constituted securities fraud, even assuming that he actually reported any of this,

which is an issue that may not be resolvable on this motion, but if we don't solve things of this motion, would certainly come to a head later on.

If I may, your Honor, so those are the two main bases for the motion with respect to the Dodd-Frank whistleblower claim.

As I said, we would not at this point be seeking to move against the express contract claim, although we respectfully reserve the right to move as against it later.

With respect to the implied covenant claim, that claim appears to be predicated on exactly the same facts as the express contract claim; it appears to seek the exact same damages. It's unclear from the complaint what facts would actually underlie that claim, separate and apart from the express contract claim. And the only supposed basis for the express contract claim is the defendants' alleged or allegedly having prevented the plaintiff from exercising certain tagalong rights to sell certain inventive shares. There is nothing in the complaint that could possibly support the implied covenant claim other than that allegation underpinning the contract claim. So that claim has to go under well-settled New York law. There is no possible way for a plaintiff to impose obligations that aren't found in the parties' written agreement, which there is in this case.

With respect to the fiduciary duty claim, there are

two main reasons why it has to be dismissed. The first is similar to the reason that I just articulated. In particular, New York law could not be clearer that you cannot have a fiduciary duty claim, whereas here, the parties have a written agreement governing the exact same subject matter. Again, there are no facts asserted in the complaint that could possibly underlie the fiduciary duty claim that are different from those that underlie the contract claim.

And then second -- and I should have mentioned this first perhaps -- is the fact that the plaintiff in this case is suing his former employer. New York law is unequivocally clear. You cannot have a fiduciary duty from an employer to an employee. There are legions and legions of cases on that point.

And then finally, your Honor, with respect to specific performance, with all due respect to my adversary, it looks like that portion of the complaint was copied and pasted from another complaint, because it refers to supposed harm to the plaintiff's business, which is not really described in the complaint, so I'm not sure what that could be. But the fact of the matter is specific performance -- it is recognized both in New York State courts and New York federal courts applying New York law -- is not a standalone cause of action; it's a remedy. It's in the Court's discretion. So perhaps it can be in the prayer for relief, but it is not a separate claim and it can't

be asserted as such. In any event, as your Honor well knows, specific performance is an equitable remedy.

Here, the plaintiff is seeking money damages. Any injury that he alleges to have suffered is compensable, if at all, with money. He hasn't put forth any allegations that would suggest otherwise and, therefore, specific performance as a matter of law is barred.

So those are the grounds.

I'd be happy to answer any questions, your Honor.

THE COURT: Thank you very much.

Let me turn to counsel for plaintiff. As I said earlier, this is not oral argument on the motion itself; however, I've just given counsel for defendant some time to describe the potential bases for their motion to dismiss, so I'd like to give you the opportunity to respond now if you'd like.

MR. SACK: Thank you, your Honor.

I'd like to hand up to the Court a SEC Form D that was filed on February 15th, 2015. It's matter of public record. It was filed by the defendants' predecessor entity, Vital Matters, LLC, in connection with its issuance of $6 million worth of securities which the plaintiff was involved with and participated in initially. So to suggest that the SEC rules and regulations don't apply to this CFO and whistleblower as pled in Dodd-Frank is to belie the facts of this matter.

THE COURT: I'm sorry. Would you clarify please. I've been handed a document which I will mark as Court Exhibit 1 for identification purposes. It appears to be a download from the SEC website time stamped 3:04 p.m., today's date, for a company named Vital Matters, LLC.

Can you describe further what the document is that you've handed me, counsel, before I question you about it?

MR. SACK: Yes.

Your Honor, on the second page you'll note it says "employer identification number," a tax ID number on the second page. I put a green sticker there.

THE COURT: Thank you. Yes, I see it.

On the second page it states that the company's full name is Vital Matters, LLC, with the state of incorporation of Delaware, and it provides an IRS number that ends in 866.

MR. SACK: That IRS number is the same number of the defendant Blink Health. Vital Matters LLC delisted and then relisted as Blink Health, Ltd. in Delaware. So there's a bit of a corporate shuffle, but we are dealing with one and the same entity.

THE COURT: I'm sorry. You said it delisted and then it relisted. What are you referring to?

MR. SACK: It changed its name. And we see that literally on almost a weekly basis. Blink Health seems to be sprouting new corporate entities as most recently as December

6th, when we are watching what happens in Delaware --

THE COURT: Thank you.

MR. SACK: -- in respect of new filings.

But to the point that counsel raises with regard to his statement that there has been no filing with the SEC I think belies the facts that, in fact, a SEC filing was made back on February 20, 2015 in connection with securities that were issued by Vital Matters, LLC. And those same securities are folded into the current iteration of defendant Blink Health, Ltd.

THE COURT: Thank you.

Let me just accept those statements as accurate for purposes of this conference.

Looking at the Sarbanes-Oxley statute, it provides whistleblower protection for employees of publicly-traded companies. The language of the statute reads: "No company with the class of securities registered under Section 12 of the Securities Exchange Act... or that is required to file reports under Section 15(d) of the Securities Exchange Act... "

Is it your position that Blink Health, assuming that it is, as you say, the successor to Vital Matters, LLC, is a company with a class of securities registered under Section 12 of the Securities Exchange Act or that it is required to file reports under 15(d)?

MR. SACK: I haven't gotten that far at this point in

my inquiry; however, this is all, to me, besides the point, because Dodd-Frank is an expansive statute that applies here. Specifically, the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C., 78 --

THE COURT: I'm sorry. Can I just ask you to come back to the question.

Is it your position that the defendant Blink in this case is a company with listed securities or that is required to file reports under Section 15(d) of the Exchange Act?

MR. SACK: I can't answer the "or" part. I can say that they have filed a Form D with respect to securities that were previously issued.

THE COURT: Thank you.

So at this point, you do not know whether Blink has listed securities or if it is required to file reports under Section 15(d) under the act?

MR. SACK: That is correct.

THE COURT: Thank you.

Proceed.

MR. SACK: According to the expansive statute, the Dodd-Frank statute, it is unlawful for an employer to discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against a whistleblower in terms and conditions of their employment because of any lawful act done by the whistleblower. The

company need not be public.

THE COURT: I'm sorry.

What are you pointing to in terms of the specific statutory provision to which you're referring?

MR. SACK: 15 U.S.C. 78u-6(h)(1)(A)(i).

THE COURT: Thank you.

That (i) says: "In providing information to the commission in accordance with this section."

MR. SACK: And the case law that's followed has come down clearly that an individual need not actually file with the SEC in order to obtain whistleblower status.

THE COURT: I'm very aware of that because the circuit reversed me in quoting that.

Let me ask you though which of the three prongs of the statute is the basis for your claim that the Dodd-Frank statute applies?

MR. SACK: It's our contention -- I believe it's been pled -- that the whistleblower in this instance, Mr. Kakaulin, possessed a reasonable belief that the information that he was providing related to possible securities law violations.

And specifically --

THE COURT: I'm sorry. Let me step back.

That he was providing to whom?

MR. SACK: To the CEO and board of Blink Health.

THE COURT: Thank you.

Oh, I see.

Counsel, is it your understanding that the Second Circuit's decision in the *Berman* case means that under prong one of (h)(1)(A) you can provide information to any person as opposed to the commission? Is that how you understand that decision?

MR. SACK: Forgive me for flying solo here. However, my understanding of *Berman* is that the statutory language defining "whistleblower" was deemed to be ambiguous and, therefore, required a deference to the rule defining a broader scope of whistleblower protection to individuals who report to persons other than the SEC.

It is my belief that the facts at bar in this instance, the CFO was duty-bound to report to the CEO and to the board that, for example, they failed to provide material information that would have changed the outgoing CEO's investment decisions to be repurchased from his stock without knowing that, for example, they were issuing shares to new buyers at a much higher valuation at the same time they were requiring him to redeem at much lower prices.

THE COURT: Thank you.

MR. SACK: He's also in respect of -- and, again, in no particular order, in respect of the fiduciary duty claim --

THE COURT: Thank you.

Let's linger on the SEC claim, if we can.

(h)(1)(A) of Dodd-Frank provides anti-retaliation protection because of any lawful act done by the whistleblower, one, in providing information to the commission in accordance with this section; two, in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the commission based upon or related to such information; or, three, in making disclosures that are required or protected under the Sarbanes-Oxley Act...

Which of the three categories are you pointing to as the basis for liability here?

MR. SACK: I'd rather not plead it in open court. I believe it's one, but I don't have the specifics of the statute in front of me, your Honor.

THE COURT: I'd be happy to hand it to you.

MR. SACK: I do believe it's one.

THE COURT: Did you plead in the complaint that the plaintiff provided information to the SEC?

MR. SACK: No, he did not plead anything to the SEC.

THE COURT: Thank you.

In which case, which of the provisions is it that you point to?

MR. SACK: I believe it's the other persons, is that -- I regret, your Honor, without having it, I am not in a position to --

THE COURT: I'm handing you a copy of the statute.

(Pause)

MR. SACK: It's my understanding, your Honor -- and, again, I apologize for not having all the case law at my hands. It's my understanding that the way the district has come down in interpreting (i), meaning providing information, it is information to other persons, not necessarily only the SEC.

My position is that the plaintiff in this instance advised the powers that be that there were some serious issues that he believed or reasonably believed were violative of securities laws, pricing securities for one person at the same point in time, the same series of securities, at one price, while reoffering them to other folks at another price, without disclosing to either their arbitrary pricing structure. And these are securities that were registered per Form D under, I believe, the '33 Act.

So it is my belief in answering your question, your Honor, that it's (i) that permits the plaintiff to establish a whistleblower claim under Dodd-Frank.

THE COURT: Thank you.

You will have the opportunity to review the case law as you respond to the motion to dismiss.

Would you please hand forward the copy of the statute that I just handed to you, counsel.

Thank you.

Good. So thank you very much for stating your

understanding of how the Dodd-Frank Act and Sarbanes-Oxley function in your statements regarding the status of your knowledge regarding whether this company has listed securities or makes filings under the act.

Would you like to also address the proposed arguments that were raised by defendants regarding the New York law claims?

MR. SACK: On the fiduciary duty claim, it is noted that the plaintiff was not only an employee, but he was also the largest employee shareholder at the time of his dismissal. And he believes that there was a breach of the fiduciary duty of his rights as a shareholder.

In respect of specific performance, you are dealing with a company that, for whatever reason, had evaluation of 20 million, and today professes to have an evaluation of $300 million. So the tagalong rights that the plaintiff is claiming he was deprived of exercising, along with the CEO and codefendant Brothers Chaiken, when they exercised their rights to cash out some stock, have appreciated materially in value. He only sought to take his pro rata portion of stock grants at the time, which were valued at $1.2 million, which today may have a value of multiples of that.

So it is our belief that in respect of specific performance, you can't just simply say -- you can monetize it as of one particular day when the company is depriving him the

right of the bargain for benefit of owning the shares and liquefying, disposing, holding, hypothecating at his choosing property that would have otherwise enured for his own personal benefit.

THE COURT: I'm sorry, would you mind restating that please.

MR. SACK: The shares of stock have value that fluctuates. You can't just monetize it and say, It was worth X dollars and that's all you're entitled to get.

The plaintiff believes that he's entitled to the shares of stock themselves. And as he had indicated, I think it's pled in the complaint sufficiently so, his intention was to hold on to the remaining shares that had been granted to him.

THE COURT: Thank you.

Why isn't the appropriate test to value the shares of the date of the alleged breach, so value it then with the fixed valuation?

MR. SACK: If the shares go up in value, the defendants derive the benefit. If the shares go down in value, the plaintiff derives the benefit.

THE COURT: Thank you.

MR. SACK: The plaintiff sought to retain those shares and did not wish to sell them.

THE COURT: Thank you.

What else would you like to tell me?

MR. SACK: That's all I have in respect of the comments in response to counsel's premotion.

THE COURT: Thank you very much.

As I said, you will have the opportunity to fully brief these issues before the Court draws any conclusions regarding the proposed motion.

At this point, however, I'd like to set a schedule for the briefing of the proposed motion to dismiss.

Counsel for defendants, by when would you expect to bring your motion?

MR. LAUFER: Your Honor, we can do whatever is convenient for the Court.

One other thought that I had was that -- and I understand that your Honor wants to enter an order now. I'm happy to confer with plaintiff's counsel and submit today or tomorrow a proposed briefing schedule. We haven't discussed it. Barring that, we can set a date for --

THE COURT: Thank you.

I'm happy to set a schedule now.

Let me tell you that I am not going to press any particular deadline for you to submit your motion. I would like to hear from each of the parties what you each would respectively propose for first initial submission of the motion. I say that largely mindful of the fact that today is

the 8th and the holidays are fast approaching.

MR. LAUFER: Thank you, your Honor.

I'm glad you raised that; I didn't want to. But I think mid January would be a reasonable period of time for us to prepare the motion and file it. I don't know what date January 15th or 16th falls on, but somewhere in that time period would be fine with us, if that's okay with your Honor.

THE COURT: Thank you.

Counsel for plaintiff, what's your view regarding that proposal? I think that Tuesday is January 17, which is the day right after Martin Luther King Day. Is that acceptable to you as the date by which this motion must be filed, counsel for plaintiff?

MR. SACK: Yes, your Honor.

THE COURT: Good. Thank you.

Now, counsel, how much time would you propose to submit your opposition?

MR. SACK: Your Honor, may we request February 16th?

THE COURT: Thank you.

Counsel, what's your view?

MR. LAUFER: If that works for plaintiff's counsel, that's fine by us.

THE COURT: Thank you.

I'll accept that.

Can any reply be filed within two weeks following

service of any opposition?

MR. LAUFER: Yes, your Honor.

THE COURT: Thank you.

So the briefing schedule follows the motion to dismiss due no later than January 17. I'm going to set a deadline of February 16 for filing of the opposition. Any reply will be due two weeks following service of the opposition.

Good. Thank you very much.

Is there anything else that we should discuss with respect to this proposed motion at this time?

MR. STERN: Your Honor, sorry. Eric Stern for the record.

Just that these dates are subject to the Court's rules of being a 21-day window to replead and file an amended complaint to address the issues raised in the motion?

THE COURT: Thank you.

Yes. Under the rules, plaintiff has 21 days after filing of the motion to file an amended complaint, if you wish, rather than opposing. I expect to issue an order shortly after the motion is filed that would reaffirm that principle, but that's a right that you have under the rules, the civil rules, not only my rules.

MR. STERN: Thank you, your Honor.

THE COURT: Thank you.

MR. LAUFER: Nothing else on this particular issue

from defendants' perspective, your Honor.

THE COURT: Good. Thank you very much.

So with respect to this issue, please read the *Berman* decision, counsel for plaintiffs. It is informative and there is also a substantial amount of other case law on the issues that we've just been discussing. The issue on which the circuit reversed me is not the issue here.

MR. LAUFER: I should also just mention that was a two-to-one decision, your Honor, so just to make it clear for the record.

THE COURT: Judge Jacobs wrote a very strong dissent in that case.

Proceed.

MR. LAUFER: This is on the second letter, your Honor.

THE COURT: Please.

MR. LAUFER: I am happy to address these issues, your Honor, in whatever manner is preferable to the Court.

We were admittedly circumspect in our letter in raising this issue. It's sensitive; it's potentially embarrassing; it concerns certain potential ethical violations. And we had asked for a conference in chambers on this issue, but we'll defer, of course, to the Court's directive on that issue.

THE COURT: Thank you.

I don't know what the topic is. My preference would

be to first hear from counsel for plaintiffs, to the extent that you can have a meaningful position, given our mutual lack of information about what the issue is.

MR. SACK: Over the course of several weeks, if not longer, counsel and I have engaged in productive, long conversations about our differences of opinion and agreeing to disagree in respect to facts, law, and so forth.

I have an indication of what counsel is referring to in his second letter. I would also defer to the Court in respect of whether or not counsel's statements should be on the record or *in camera*.

THE COURT: Thank you.

Let's proceed on the record. To the extent that any party has an application to then seal any component of the transcript, you can make that application during the window after it's posted and before it becomes public. I'll give a more informed decision with the information in front of me.

MR. LAUFER: Very good, your Honor.

THE COURT: Proceed.

MR. LAUFER: If I may.

Your Honor, there's a little bit of factual background here that's necessary to understand the issue.

Now, as we just heard, as your Honor is aware, this case purports to assert whistleblower claims and several common law claims.

The plaintiff, who's here today, is Eugene Kakaulin. He is the former CFO of one of my clients in this case, Blink Health. He was fired for cause earlier this year over the summer, and he's represented, of course, by the Sack & Sack law firm.

When we were retained to represent the defendants in this matter, we were all -- both my partners on this case and, of course, our clients -- quite stunned by some of the allegations in the complaint. In particular, your Honor, I'd like to direct you to paragraph 110 of the complaint. I'll give your Honor a chance to pull it up.

The allegations at paragraph 110 -- and you can see that there's a screenshot there -- concern a certain text message exchange between one of my clients, Geoffrey Chaiken, and his father from August 2015. I won't read the contents of the text message into the record, but suffice it to say that they are hurtful and embarrassing and damaging. But that's not the reason that we are here on this application.

As I said, the complaint actually has a screenshot of this entire exchange. And what alarmed us and our clients was how did this screenshot of a text message exchange between Geoffrey Chaiken and his father wind up in this complaint?

A little bit of factual predicate, your Honor.

There is a Blink in-house lawyer who's name I am not going to mention in open court for the reasons that we talked

about earlier; I don't want to cause some unnecessary embarrassment or even professional harm or possibly worse. That in-house counsel has been placed on administrative leave, but he is still employed technically by Blink today, and he is still today being paid by the company. That happened just a few months ago.

In April of last year, April of 2015, this individual was asked by one of the founders of Blink to conduct an internal investigation into an issue that has nothing to do with any of the issues in this case. I'm mentioning this only by way of background. And that, of course, was done in this individual's capacity as an in-house lawyer for the company. This individual is a member of the New York Bar, he's licensed; I understand that he is a member in good standing today.

In connection with that investigation concerning the issue at hand, Mr. Chaiken gave this in-house lawyer credentials for Mr. Chaiken's iTunes account. He also gave him credentials to access an encrypted MacBook Air computer that only two individuals had access to or had credentials for: Geoffrey Chaiken and this individual whose name I won't mention right now, the in-house lawyer. That access, both to the iTunes account for Mr. Chaiken and the computer, were given to this in-house lawyer for a single purpose: To conduct this privileged internal investigation concerning a company issue.

Now, given the fact that we saw this screenshot, we

retained a forensic firm to determine how it could be that the screenshot -- that this text exchange between Mr. Chaiken and his father could wind up here, given that the only person who we believed had access to text messages on Mr. Chaiken's phone was this in-house lawyer. We retained a firm by the name of Stroz Friedberg. Your Honor may be familiar with it; we've used them many times; they are a very reputable forensic consulting firm.

They determined that only one computer has ever been synched to Mr. Chaiken's iTunes account; and that that happened back in April 2015; and that it was the computer that I was just mentioning earlier. Stroz also was able to conclude that the screenshot, based on the way it appears, its dimensions, its width, the way it looks in the complaint, was not taken from Mr. Chaiken's phone or any other phone; it had to have been taken from a computer. And since the only computer that was synched to Mr. Chaiken's iTunes account was the computer to which Mr. Chaiken and this in-house lawyer had access, necessarily or logically, Stroz and we concluded that the screenshot came from that computer in the context of this internal privileged investigation conducted by this in-house lawyer last year.

Now, this screenshot you'll see is from August 2015. I told you that the access was gained in an authorized fashion for a limited purpose and in limited scope in April.

What we have reason to believe is that this in-house lawyer not only accessed information that he was not supposed to, but continued to access Mr. Chaiken's iTunes account and this computer for months after and possibly a year after. We have been able to determine that the Mac Air Book was wiped clean earlier this year, based on Stroz Friedberg's analysis. We don't know who did it or why; it is not Blink's custom or practice to wipe clean computers, but that's the case.

So, in short, your Honor, based on our investigation, interviews, other work we've done in the forensic analysis, we believe that the complaint here, specifically, this allegation, and perhaps others, contains information that was provided either to the law firm representing the plaintiff here or the plaintiff himself, and that was obtained by an in-house lawyer who obtained the information in a privileged capacity and misappropriated it, essentially stole it. The reason we think that this ended up here is not only because the plaintiff and this in-house lawyer were former colleagues and possibly friends, but it is also the case that the law firm representing the plaintiff here also represents this in-house lawyer.

Now, we have very significant concerns about what is going on here. I do not know what my adversary knew when the complaint in this action was drafted; I don't know what my adversary knew when the complaint in this action was filed. But I do know that about a month ago, on November 9th, we sent

a letter to my adversary -- and I have a copy of it for your Honor, if you'd like, it's six pages long -- where we laid out the bases that I've just articulated here. In light of what our findings showed and the investigation showed, we requested that the complaint be withdrawn and that the allegations be stricken, not only these, but any others that may be tainted by this issue.

I'll just direct your Honor, for example, there are various paragraphs sprinkled throughout the complaint that appear to be quotations; they are in boldface text. If you look -- I'll give you a couple of examples. Paragraph 30, paragraph 32, paragraph 53, and paragraph 79. And there are many more. They are presented as quotes from my clients. I have no idea where these supposed quotations came from. We don't know if the plaintiff here or someone else videotaped or tape-recorded my clients. We don't even know if those quotations are simply renditions by plaintiff's counsel or plaintiff of what happened, but they are presented as actual quotations. We, of course, deny the substance of those quotations. But given the conduct that I've just described, we are very concerned about the source and bases of those quotations as well.

That's not all.

The complaint also contains a screenshot, and it's on the preceding page, from the screenshot involving the text

between my client and his father involving a former girlfriend of one of my clients. And, again, it has absolutely no connection to any of the allegations or claims in this case. And I think that the quotations and this extra screenshot can inform a particular view of the plaintiff's allegations.

Given all of these circumstances, the fact that we have put plaintiff on notice of our concerns, we have asked that the complaint be withdrawn and/or that the allegations be stricken. We have very significant concerns about the propriety of this allegation and others, the basis and source for those allegations. We believe that the complaint should be immediately withdrawn and that these allegations and perhaps others that are implicated should be stricken.

I would also suggest that there might be other remedies, your Honor. Depending on the direction in which your Honor would like to go here, we think that some limited discovery of the plaintiff and perhaps others, including the law firm representing the plaintiff, and the individual who we believe provided this information by way of deposition, for example, is warranted.

Finally, your Honor, I should just mention that we have, in our letter of November and in our subsequent discussions with plaintiff's counsel, not only asked for the complaint to be withdrawn, but we have presented the findings of our forensic analysis and our investigation. We have been

met with nothing but silence. We have not heard a denial; we have not heard an explanation; we have not heard a repudiation or disavow of any sort. And so we find ourselves in the situation where all the arrows are pointing in one direction and nobody on the other side is telling us any different.

So we have very serious concerns about this. We'll take direction from your Honor about how to proceed, but we wanted to raise the issue with your Honor now. Thank you.

THE COURT: Good. Thank you.

Can I hear from counsel for plaintiff on these issues.

MR. SACK: At the first footnote in what appears to be hundreds of complaints that I had filed in my 27 years at the bar, it states: All directly-quoted statements, unless otherwise specified, are the sum and substance of such statements as recalled by plaintiff.

In each and every pled quotation --

THE COURT: I'm sorry, which footnote are you pointing me to?

MR. SACK: On page 4.

THE COURT: Thank you very much.

MR. SACK: As is my practice, my firm's practice, when we plead these complaints, we are very careful so that we can avoid any issues regarding motion practice. So we like to put in as much fact as we can, including quotes, all of which, in every paragraph where counsel is referencing quotes, these are

quotes directly from Mr. Chaiken to Mr. Kakaulin in his capacity as CFO.

For example, in paragraph 32, when Mr. Kakaulin, who had these tagalong rights, asked Mr. Chaiken why he was selling stock at an early phase, being founder, he stated he needed to buy a house in the Hamptons. Banks want to see cash, not stock. These are directly-quoted quotes as recalled by the plaintiff, and I'm free to plead as I wish.

I'm not going to go through each and every quote, but I will turn to the point made in paragraph 110, which, I believe, is what's gotten counsel so disturbed, is the fact that the father, the defendant, Geoffrey Chaiken, was upset with the fact that he had offered to buy stock at a lower valuation. By the way, it's important to note that Mr. Spencer Falk, as indicated in this text, was told to sell his stock at 100,000; and the son was reoffering it to his father at the same time for 200,000, looking to make 100 percent profit on his father. What's most notable about that is the son is now reoffering $200,000 worth of stock at a higher valuation, and the father finds that behavior to be unsavory and disturbing as indicated in his text.

Counsel makes great leaps in drawing conclusions. I've never seen his Stroz Friedberg report. He's told me what he believes to be information that's been obtained by an attorney. And, of course, he's entitled to any discovery

whatsoever, I'll put to the proof, but the point remains that we have not a termination for cause, but retaliation against the CFO who was entitled to drag along tagalong rights when he sought to exercise his contractual rights, he was told, No, no, no, it doesn't look good for you to be selling along with us, you are the CFO. Those are material issues of fact that need to be vetted.

He's then terminated for cause. He's deprived of his bargain for a benefit after providing work, labor, and services on behalf of this company. And the termination for cause, as you'll find, as this case proceeds, is nothing but a sham in order to deprive him of all both the vested stock and the unvested stock.

So counsel can make this much ado about the complaint and litigate every word in this document, and that's fine with me. We are prepared for whatever the long haul may lead us to in respect to this matter. But as it relates to some sort of untoward allegation or assertion that anybody is be behaving unethically or inappropriately, I'd just be mindful of those statements without having any factual basis to support them.

THE COURT: Thank you.

Do you want to tell me where you got the screenshot that's included in the complaint?

MR. SACK: Yes. And I've indicated to counsel that the screenshot was a photocopy from the photocopy machine in

the office.

THE COURT: Thank you.

With respect to the comments regarding your firm's representation of both plaintiff in this action and the in-house attorney who they described in their remarks, can you make any comments?

MR. SACK: In respect of --

THE COURT: Do you represent him?

MR. SACK: I represent the in-house attorney.

THE COURT: Do you view that representation as potentially raising a conflict?

MR. SACK: Not as between my two clients.

THE COURT: Thank you.

Now, is there anything else that you'd like to tell me about these issues at this time?

MR. SACK: Well, counsel can go ahead and bang on the table and make these an issue so that he creates a conflict, but the attorney has not filed any lawsuit. We've sought to negotiate his exit. We were in the process of doing that. These aspersions are merely that.

It would be helpful for counsel to go ahead and show me whatever he wants to show me to indicate that some review of emails from April somehow prospectively assume that in August, some four, five months later, that's where the information came from. But that's simply not the reality, as I understand it.

THE COURT: Good. Thank you.

Let me just say this to this point: There are a number of issues that defense counsel has raised here. I don't believe that I'm in a position at this point to take any action with respect to them. If there is an issue, the facts will come out and we'll have the opportunity to address them in more depth.

Now, counsel for plaintiff is on notice of the issues and can take his own counsel with respect to whether the joint representation presents a conflict. I can't comment on that. I accept as a proffer regarding the provenance of the text message in the complaint.

Now, there's a request for potential limited discovery regarding these issues. We have an initial pretrial conference scheduled for January 3rd, at which I intended to discovery broadly, and I hope still to do so. Unless there's a request to stay discovery pending resolution of the motion to dismiss that I grant, I expect that both parties will be conducting discovery on all issues after you've had your 26(f) conference, which I don't know that that's happened yet.

MR. SACK: That's correct, your Honor.

THE COURT: Thank you.

Have you had your 26(f) conference yet?

MR. LAUFER: We have not.

THE COURT: Thank you.

So I don't think I need to take particular action to allow focused, limited discovery on this issue. I don't have the basis to conclude that it is either within or outside the scope of discovery for the case as a whole; it appears to be relevant from the information that I have at this point. I'd evaluate any requests to limit or constrain the scope of discovery, any discovery requests asserted by defendants in the event that plaintiff seeks such a restriction.

At this point, there's been no stay requested with respect to discovery. So, as I said, after the parties have taken the necessary steps, I expect that you will be able to begin discovery using the regular protocols, and then we'll set a clear discovery schedule at our next conference.

I scheduled that next conference for January 3rd, using, I'll call it, my usual practice. I'd be happy to have that initial conference sooner if the parties would like, and I can put in place a discovery schedule if you would be ready sooner than that to discuss discovery as a whole and whether there are any applications for stay pending resolution of the motion and otherwise to set the schedule going forward.

Would that be helpful? Would you like for me to advance the date for the initial pretrial conference or should we keep it where it is?

Counsel for plaintiff?

MR. SACK: I have no particular feeling one way or

another, given where we are at the end of the year.

THE COURT: Thank you.

Counsel?

MR. LAUFER: We are fine leaving it where it is.

THE COURT: Good. Thank you.

So we'll leave it where it is.

Is there anything else that we should discuss here, counsel?

MR. SACK: Nothing from plaintiff, your Honor.

THE COURT: Good. Thank you.

Counsel?

MR. LAUFER: If I may just be heard very briefly, your Honor.

THE COURT: Please proceed.

MR. LAUFER: We, of course, respect your views on the issue that we just discussed; and we again thank you for the opportunity to be heard on it.

The only thing I will point out, since we are on the record, is that your Honor decided to accept the proffer by plaintiff's counsel concerning provenance.

THE COURT: I'm sorry. Let me say this. Thank you.

I accept the proffer as what it was stated by counsel on the record during this conference. I do not adopt it as a finding of fact. The facts will develop as they are. The statement will be proven true or untrue as the case progresses.

What I meant to say was that I don't have a basis to take issue with the assertion by counsel. And you're a member of the bar, so I accept your proffer as true, in the absence of established facts to refute them; although I understand that that is a disputed issue.

MR. LAUFER: Of course, your Honor.

I didn't mean that there would be a finding in the case going forward.

THE COURT: Thank you.

MR. LAUFER: The only thing I would point out is that the explanation by counsel did not actually identify where the document came from other than from a photocopier. But I accept your Honor's view on this at this time.

THE COURT: Thank you.

MR. LAUFER: Thank you.

THE COURT: You'll have the opportunity to present more facts at a later stage in the case. If that statement proves to have been false, we'll deal with it at the time.

Is there anything else that we should discuss, counsel?

MR. SACK: Nothing from plaintiff, your Honor.

THE COURT: Good. Thank you.

MR. LAUFER: Nothing from defendants.

THE COURT: Good. Thank you all.

This proceeding is adjourned. (Adjourned)